110-272

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1185.~~ 809

JANE F. JAMES, ADMINISTRATRIX OF WILLIAM JAMES, DECEASED, LATE COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

SAMUEL D. HICKS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED DECEMBER 15, 1882.

SUPREME COURT OF THE UNITED STATES.

No. 1183.

JANE F. JAMES, ADMINISTRATRIX OF WILLIAM JAMES, DECEASED, LATE COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

SAMUEL D. HICKS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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a In the circuit court of the United States for the eastern district of Virginia.

SAMUEL D. HICKS
against
JANE F. JAMES, ADMINISTRATRIX OF WILLIAM James, deceased. } No. 1371.

TRANSCRIPT OF THE RECORD.

1 In the circuit court of the United States for the eastern district of Virginia.

SAM'L D. HICKS, PLAINTIFF,
against
JANE F. JAMES, ADMINISTRATRIX OF WILLIAM James, deceased, defendant. } 1371.

Be it remembered that heretofore, to wit, on the 24th day of October, 1879, came Jane F. James, administratrix of William James, deceased, and filed her petition in the above-entitled cause, which petition is in the words and figures following:

Petition for removal.

To the circuit court of the United States for the fourth circuit and eastern district of Virginia:

The petition of Jane F. James, administratrix of William James, deceased, the defendant in a certain action at law or civil suit, instituted by Sam'l D. Hicks, in the circuit court of the county of Hanover, State of Va.

Your petitioner, Jane F. James, administratrix of William James, deceased, respectfully represents to the court that the late William James, your petitioner's intestate, was previous to his death collector of
2 the internal revenue district of the United States of which Richmond, Virginia, was the central office, and as such was an officer of the United States of America, charged with the collection of the revenue of the United States within said district, and was an officer acting by authority of the revenue laws of the United States; that while acting as such revenue officer of the United States one Samuel D. Hicks claims that the said William James required him, the said Hicks, to pay as revenue to the United States 15 cents per pound on 21,952$\frac{14}{15}$ pound' of tobacco, shipped and exported from Richmond, Virginia, to New York, and the said Hicks claims also that said tobacco was not liable to said tax or revenue of 15 cents per pound; the said William James has departed this life and your petitioner has qualified as his administratrix, and the said Samuel D. Hicks has instituted his civil suit or action at law in the circuit court of the county of Hanover against your petitioner, as administratrix as aforesaid, claiming that as said sum of money was paid under protest, and as said tobacco was not liable to the tax aforesaid, he should be paid the same. If there is any claim, or pretence of claim, in
3 the said action or civil suit it arises and accrues to the plaintiff

therein against the said William James, as an officer of the United States, acting under and by authority of the revenue laws of the United States. A copy of the declaration filed in the said suit is herewith filed, marked Exhibit A, and is prayed to be taken as part hereof.

Your petitioner is advised that the said action at law or civil suit should be removed to this court; that the same should be docketed on the docket of this court, and here farther proceeded in.

Your petitioner prays that the said action at law or civil suit of the said Samuel D. Hicks against your petitioner as administratrix as aforesaid of William James, deceased, may be removed for trial into this circuit court of the United States for the fourth circuit and eastern district of Virginia, being the circuit court in the said district in which said civil suit or action is pending, and that the same be proceeded in according to the provisions of the statute in such cases made and provided. (See section 643 Rev. Stat. U. S.) And your petitioner will ever pray, &c.

JANE F. JAMES.

4 COUNTY OF HANOVER, *to wit:*

This day personally appeared before me, the undersigned, a notary public for the county of Hanover, in the State of Virginia, Jane F. James, administratrix of William James, deceased, and made oath that the statements made in the foregoing petition are true.

Given under my hand this 24th day of October, 1879, & under my notarial seal.

[NOTARIAL SEAL.] WM. J. LEAKE, *N. P.*

I, William Josiah Leake, an attorney and counsellor at law, practising in the circuit court of the county of Hanover, a court of record of the State of Virginia, do hereby certify that as counsel for the petitioner, Jane F. James, administratrix of William James, deceased, I have examined the proceedings against her mentioned in the foregoing petition, and I have carefully enquired into all the matters set forth in the said petition, and I certify further that I believe them to be true.

Given under my hand this 24th day of October, 1879.

WM. JOSIAH LEAKE.

5 And on another day, to wit, on the 27th day of October, 1879, a writ of certiorari was sued out of the clerk's office of said circuit court of the United States, which certiorari, with the return thereon, is in words & figures following, to wit:

Certiorari.

The President of the United States of America to the judge of the circuit court for the county of Hanover, State of Virginia, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the eastern district of Virginia, in the fourth circuit, shall be certified of a certain cause commenced before you against Jane F. James, administratrix of William James, deceased, defendant, by Samuel D. Hicks, plaintiff, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said cir-

cuit court, at the city of Richmond, forthwith, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

6 Witness, Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, the 27th day of October, 1879.

[SEAL.] M. F. PLEASANTS, *Clerk.*

J. A. Wingfield is hereby deputed to execute this writ and make return in due form.

C. P. RAMSDELL,
U. S. Mar.

OCT 27TH, 1879.

Executed October 28th, 1879, on W. S. Barton, judge of the circuit court of Hanover County, State of Virginia, by delivering to him a copy of the within.

J. A. WINGFIELD.

And on another day, to wit, on the 21st day of November, 1879, in obedience to the foregoing writ of certiorari, a transcript of the record in the above-entitled cause in the circuit court of the county of Hanover was filed in the clerk's office of the said circuit court of the United States, which transcript is in the words and figures following, to wit:

Transcript of record.

VIRGINIA:

Pleas before the circuit court of the county of Hanover, at the court-house thereof, on the 28th day of October, 1879.

7 SAMUEL D. HICKS, PLAINTIFF,
against
JANE F. JAMES, ADMINISTRATRIX OF WILLIAM James, deceased, defendant.

Be it remembered that on the 15th day of August, 1879, came the plaintiff, by his attorney, and sued out of the clerk's office of Hanover circuit court a summons against the defendant, which, with the return thereon made, is in the words and figures following:

The commonwealth of Virginia to the sheriff of Hanover County, greeting:

You are hereby commanded to summon Jane F. James, adm'r'x of Wm. James, dec'd, to appear at the rules to be held in the clerk's office of our circuit court of Hanover County, on the first Monday in September next, to answer the action of Samuel D. Hicks of a plea of trespass on the case in assumpsit (damages, $7,000.00), and have then there this writ.

Witness, J. A. Brown, clerk of our said court, at the court-house, this 15th day of August, 1879, in the 104th year of the commonwealth.

J. A. BROWN, *Clerk.*

8 Executed Aug. 30th, 1879, on Jane F. James, administratrix of Wm. James, deceased, by leaving a copy of the within, and also a certified copy of the account, for her at her residence, with a white female member of her family over the age of sixteen years, and explaining the same to her, the said Jane F. James being too unwell to be seen on business at the time of service.

JAMES M. JONES, *D. S.*,
For D. L. JONES, *S. H. C.*

The following is a copy of the account upon which this action was founded:

1865, Oct. 21st. Wm. James, dec., late collector of int. rev. for 3rd dist. of Va. (intestate of Jane F. James, admr'x aforesaid & def't), Dr. to Sam'l D. Hicks, pl't.

To 15c. per lb. on 21,952$\frac{14}{15}$ lbs. manf. tobacco in 218$\frac{3}{4}$ boxes exported to New York of free tobacco $3,292 95

with interest on same from 21st Oct., 1865.

And at another day, to wit, at rules held in the clerk's office of said court, on the first Monday in September, 1879, came the plaintiff, by his attorney, and filed his declaration against the defendant, which declaration is in the words and figures following, to wit:

9 In circuit court for the county of Hanover.

Samuel D. Hicks, pl't., complains of Jane F. James, adm'r'x of Wm. James, dec'd, def't, who has been summoned to answer him of a plea of assumpsit, whereas, heretofore, to wit, on the 21st of October, 1865, at city of Richmond and State of Virginia, the said pl't. was the owner of 218 three-quarter boxes of manufactured tobacco, w'g 21,952$\frac{14}{15}$ pounds, of the brands of "Jno. Warren" & "Jesse Brown," which was manufactured in the summer of 1862, and sold and removed from the manufacturing premises prior to 1st Sept., 1862; that the said lot of tobacco before that time sold and removed came afterwards in the hands of Samuel D. Hicks, of Richmond, the pl't. in this suit; that the said pl't., as the owner of such a lot of tobacco, proposed to the intestate of the def't, one William James, who was then collector of the internal-revenne district of which Richmond, Va., was the central office at that time, to ship and export same to New York, claiming that the same was free tobacco under the law because it had been sold and removed from place of manufacture by his mediate or immediate vendors prior to 1st Sept., 1862; but the
10 said William James, collector of internal-rev. district aforesaid, and the intestate of the def't, refused to allow the said pl't. to ship and export his said lot of tobacco to New York unless the said pl't. would agree to pay him, the said William James, collector as aforesaid, 15c. per lb. on the same; but the said plaintiff, protesting and denying that the said James, as int.-rev. collector aforesaid, had any legal right to exact the said 15c. per lb., paid the same, to wit, the sum of $3,292.95, under protest, to said William James, collector aforesaid, before he was allowed to export

and ship his said lot of tobacco to the city of New York and State of New York, and beyond the confines of the State of Virginia.

All of which was done under the express understanding with said William James that the said sum of $3,292.95 should be returned thereafter, to said pl't. when the papers establishing the fact that the said lot of tobacco was manufactured, sold, and delivered from the place where manufactured, prior to the said 1st Sept., 1862, and the said pl't. proceeded to secure such papers which proved beyond question that the said lot of tobacco was so manufactured, sold, and delivered prior to said 1st Sept.,
1862, and upon the presentation of which to the said Wm. James,
11 as collector aforesaid, he, the said Wm. James, failed to object to
the sufficiency of said proof establishing the said fact, but referred the said pl't. to the said Com'r at Washington for refundment and payment of said sum, upon the ground that he had paid the same into the Treasury of U. S., whereupon the said Samuel D. Hicks appealed to the Commissioner of Internal Revenue at Washington to refund the same to him as having been illegally collected of him, the said pl't., by said William James, collector as aforesaid, which appeal has been pending until recently, that is to say, was on or about and after the 22d January, 1879, rejected by the Comm'r of Internal Revenue, and therefore, under the provision of the internal rev. law of 6th June, 1872, he is allowed to bring this suit within one year thereafter the rejection of said appeal. And, whereas, also, after forcing the said pl't. to pay unto him, the said Wm. James, collector aforesaid, this 15c. under protest in't. rev. tax $3,292.95, before he would allow him to ship and export beyond the limits of Va. the said lot of tobacco, and after the payment of said sum of $3,292.95 into the Treasury of U. S. the said Wm. James died on or about the day of , and the said Jane F. James, the defendant in this suit, quali-
12 fied as administratrix of said Wm. James, on day of ,
and is now his said adm'r'x. Wherefore, and by reason of the premises an action hath accrued against the said Wm. James in his life-time, and the said Jane F. James as administratrix as aforesaid, to the said pl't., to demand the said sum of $3,292.95 with interest from the said 21st October, 1865, until paid, which he has done and is still doing, and although the said pl't. often requested the said Wm. James in his life-time to pay said sum with interest as aforesaid, and although he has oftentimes requested the said Jane F. James, as his admr'x, since to pay the said sum with interest, yet neither did the said Wm. James during his life or the said Jane F. James since as his adm'r'x, ever pay him any of the said sum of $3,292.95 with interest as above demanded or any part thereof, but to pay the same both have hitherto refused and still do refuse, to the damage of the said pl't. of $7,000, and therefore he brings this suit.

And whereas also, after the said protest and appeal as in the 1st count set forth, the said intestate of the said defendant was, on or about the 21st
Oct., 1865, or thereabout, indebted to the said pl't. in a large sum of
13 money—say $7,000—for so much money by the said pl't. to the use of
the said intestate of the def't, at his special instance and request, before that time laid out, paid, and expended, and for so much money to the said intestate of the said def't, at his special instance and request, before that time lent and advanced by the said pl't., and also for so much money to and for the use of the said pl't. by the said intestate of the def't

before that time had and received, and being so indebted on account of her said intestate, the said def't (and the said intestate also), in consideration thereof, and afterwards, on the day and year and place aforesaid, assumed on (herself &) himself, and then and there promised to pay the said sum of $7,000 whenever thereafterwards the said pl't. should request said sum of money, but neither the said intestate of the def't nor the defendant have ever regarded the several promises and assumptions or paid any part thereof, but to pay both have hitherto refused and still do refuse, to the damage of $7,000 of the pl't.

And whereas also, after the said protest and appeal, on the day and year and place aforesaid, the said intestate of def't accounted with the said pl't. of and concerning divers sums of lawful money from the said intestate of
14 the defendant before that time due and owing, and then and there in arrears and unpaid, and on said % the said intestate of def't was found in arrears and indebted in the sum of $3,292.95, with interest from 21st Oct., 1865, and being so found indebted on behalf of her intestate, and the intestate also being found indebted, the said def't assumed upon herself, as the intestate himself did, that they would well and truly pay said pl't. the said sum of $3,292.95, with interest aforesaid, whenever they should thereafter be requested to pay, and though the said def't and the intestate have often been requested (and her said intestate often requested), they have never regarded the said several assumptions and promises, but to pay the same, or any part thereof, they have hitherto refused, and still do refuse, to the damage of said pl't. of $7,000.

BURWELL, *P. Q.*

And the defendant not appearing, on the motion of the plaintiff, by his attorney, it was ordered that judgment be entered in his behalf against said defendant for the damages said plaintiff hath sustained for the non-performance by the defendant of the promises and assumptions in the declaration mentioned, unless the said defendant should appear and
15 plead to issue at the then next rules.

At which day, to wit, at rules held in the said office on the first Monday in October, 1879, the defendant still failing to appear, on the motion of the plaintiff, by his attorney, it was ordered that the last order made in this cause be confirmed.

And at another day, to wit, at a circuit court begun and held for the county of Hanover on the 27th day of October, 1879.

This day came the defendant, by her attorney, and entered a general demurrer to the plaintiff's declaration and to each count thereof, and the plaintiff joined in said demurrer, and the said defendant entered the pleas of non assumpsit and non assumpsit within five years before the institution of this suit, and non assumpsit and non assumpsit within five years before the institution of this suit by her intestate, William James, and the plaintiff replied generally to said pleas.

And thereupon it is considered by the court that the office judgment granted the plaintiff at the rules be set aside.

And now at this day, to wit, at a circuit court, continued and

16 held as aforesaid, for the said county, on Tuesday, the 28th day of October, 1879.

A writ of certiorari from the circuit court of the United States for the eastern district of Virginia, dated October 27th, 1879, requiring the record in this cause to be certified to that court for trial, has this day been served upon the judge of this court; and the court being of opinion that under the statute of the United States this cause should be removed to the circuit court of the United States for the eastern district of Virginia for further proceedings, it is ordered that the clerk of this court do forthwith transmit to the clerk of the United States circuit court aforesaid a copy of the record in this cause, and that all further proceedings herein be stayed. And the said writ of certiorari so served on the judge of this court is ordered to be filed among the papers in this cause.

The following is a copy of the writ of certiorari served upon the judge of this court:

The President of the United States of America to the judge of the circuit court of the county of Hanover, State of Virginia, greeting:

17 We, for certain reasons, being desirous that our circuit court of the United States for the eastern district of Virginia, in the fourth circuit, shall be certified of a certain cause commenced before you against Jane F. James, adm'r'x of Wm. James, dec'd, defendant, by Samuel D. Hicks, plaintiff, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of Richmond, forthwith, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, the twenty-seventh day of October, in the year one thousand eight hundred and seventy-nine.

[SEAL.] M. F. PLEASANTS, *Clerk.*

A true transcript of the record.

Teste:

J. A. BROWN, *Clerk.*

Statement of costs: Plaintiff, $13.97; defendant, $6.36.

Teste:

J. A. BROWN, *Clerk.*

18 *Demurrer to declaration.*

And on another day, to wit, the 11th day of May, 1881, came the defendant, by the U. S. district attorney appearing for her, and says that the said declaration is not sufficient in law.

Joinder.

In which demurrer the plaintiff joined.

And on the same day, to wit, on the 11th day of May, 1881—

Demurrer overruled & leave to file an am'd declaration.

Upon hearing the demurrer of the defendant to the declaration this day filed, and after argument by counsel, the court overruled the demurrer.

And thereupon, on motion of the plaintiff, he hath leave to file an amended declaration.

Richmond, May 11, 1881.

RO. W. HUGHES, *Judge.*

And thereupon the plaintiff, by his attorney, filed his amended declaration, which amended declaration is in the words and figures following:

Amended declaration.

In the circuit court for the county of Hanover.

Samuel D. Hicks, pl't., complains of Jane F. James, adm'r'x of Wm. James, dec'd, def't, who has been summoned to answer him of a plea of assumpsit:

Whereas heretofore, to wit, on the 21st of October, 1865, at the
19 city of Richmond and State of Virginia, the said pl't'f was the owner of 218 three-quarter boxes of manufactured tobacco, w'g' 21,952$\frac{14}{16}$ pounds, of the brands of "Jno. Warner" & "Jesse Brown," which was manufactured in the summer of 1862, and sold and removed from the manufacturing premises prior to 1st Sept., 1862; that the said lot of tobacco, before that time sold and removed, came afterwards in the hands of Samuel D. Hicks, of Richmond, the pl't. in this suit; that the said pl't., as the owner of such a lot of tobacco, proposed to the intestate of the def't, one Wm. James, who was then collector of the internal revenue district of which Richmond, Va., was the central office at that time, to ship & export same to New York, claiming that the same was free tobacco under the law, because it all had been sold and removed from place of manufacture by his mediate or immediate venders prior to 1st Sept., 1862, but the said Wm. James, collector of internal rev. district aforesaid, and the intestate of the def't, refused to allow the said pl't. to ship and export his said lot of tobacco to New York unless the said plaintiff would agree to pay him, the said Wm. James, collector as aforesaid, 15c. per lb.
20 on the same, but the said plaintiff, protesting and denying that the said James, as int. rev. collector aforesaid, had any legal right to exact the said 15c. per lb., paid the same, to wit, the sum of $3,292.95, under protest to said Wm. James, collector aforesaid, before he was allowed to export and ship his said lot of tobacco to the city of New York and State of New York, and beyond the confines of the State of Virginia.

All of which was done under the express understanding with said Wm. James that the said sum of $3,292.95 should be returned thereafter to said pl't., when the papers establishing the fact that the said lot of tobacco was manufactured, sold, and delivered from the place where manufactured prior to the 1st of Sept., 1862; and the said plaintiff proceeded to secure such papers, which proved beyond question that the said lot of tobacco was so manufactured, sold, and delivered prior to said 1st Sept., 1862, and upon the presentation of which to the said Wm. James, as collector aforesaid, he, the said Wm. James, failed to object to the sufficiency of said

proof establishing the said fact, but referred the said plaintiff to the said Com'r at Washington for refundment and payment of said sum upon the ground that he had paid the same into the Treasury of the U. S.

21 Whereupon the said Samuel D. Hicks appealed to the Commissioner of Internal Revenue at Washington, to refund the same to him, as having been illegally collected of him, the said pl't., by said Wm. James, collector as aforesaid, which appeal has been pending until recently, that is to say was on or about the 22nd Jan'y, 1879, rejected by the Commissioner of Internal Revenue, and therefore under the provision of the internal rev. law of 6th June, 1872, he is allowed to bring this suit within one year thereafter the rejection of said appeal. And whereas also after forcing the said pl't. to pay unto him, the said Wm. James, collector aforesaid, this 15 c. int. rev. tax, $3,292.95, before he would allow him to ship and export beyond the limits of Virginia the said lot of tobacco, and after the payment of said sum of $3,292.95 into the Treasury of U. S., the said Wm. James died, on or about the day , and the said Jane F. James, the defendant in this suit, qualified as administatrix of said Wm. James on day of year of , and is now the said adm'r'x.

Wherefore the said Wm. James in his lifetime, and the said Jane F. James, as his administratrix, assumed and promised to pay the said

22 sum of $3,292.95, with interest as aforesaid, and by reason of these premises an action hath accrued against the said Wm. James during his life, and hath also accrued against said Jane F. James, as his administratrix since, to the said pl't., to demand the said sum of $3,292.95, with interest from the said 21st Oct., 1865, until paid, which he has done, and is still doing, and although the said plaintiff often requested the said Wm. James in his lifetime to pay said sum, with interest aforesaid, and although he has oftentimes requested the said Jane F. James, as his adm'r'x, since to pay the said sum, with interest, yet neither did the said Wm. James during his life, or the said Jane F. James since, as his adm'r'x, ever pay him any of the said sum of $3,292.95, with interest, as above demanded, or any part thereof, but to pay the same both have hitherto refused, and still do refuse, to the damage of the said pl't. of $7,000, & therefore he brings this suit.

And whereas, also, after the said protest and appeal, as in the 1st count set forth, the said intestate of the said def't was on or about the 21st Oct., 1865, or thereabout, indebted to the said pl't. in a large sum of money—

23 say $7,000—for so much money by the said pl't. to the use of the said intestate of the def't, at his special instance and request, before that time laid out, paid, and expended, and for so much money to the said intestate of the said defendant at his special instance and request before that time lent and advanced by the said pl't., and also for so much money to and for the use of the said pl't. by the said intestate of the defendant before that time had and received, and being so indebted the said Wm. James and the said def't, in consideration thereof, and afterwards, on the day and year and place aforesaid, they both assumed on themselves and then and there promised to pay the said sum of $7,000 to said pl't. whenever thereafterwards the said pl't. should require said sum of money, but neither the said intestate of the def't nor the defendant have ever regarded their several promises and assumptions or paid any part thereof,

but to pay both have hitherto refused, and still do refuse, to the damage of $7,000 of the pl't.; and whereas, also, after the said protest and appeal on the day and year and place aforesaid the said intestate of def't accounted with the said pl't. of and concerning divers sums of lawful money
24 from the said intestate of the def't before that time due and owing, and then and there in arrears and unpaid, and on said % the said intestate of def't was found in arrears and indebted in the sum of $3,292.95, with interest from 21st Oct., 1865, and being so found indebted the said Wm. James & the said def't on behalf of her intestate promised assumed upon themselves that they would well and truly pay the said pl't. the said sum of $3,292.95, with interest aforesaid, whenever they should thereafter be requested to pay, and though the said def't has often been requested (and her said intestate often requested), both have never regarded their said several assumptions and promises, but to pay the same, or any part thereof, they have hitherto refused, and still do refuse, to the damage of said pl't. of $7,000.

BURWELL, *P. Q.*

A copy. Teste: J. A. BROWN, *Clerk.*

And at another day, to wit, on the 16th day of May, 1881, came the defendant, by her attorney, and filed two pleas, which are as follows:

1st plea.

And the said defendant, by her attorney, comes and says that the
25 said supposed cause of action in the declaration mentioned did not accrue to the said plaintiff at any time within five years next before the commencement of this suit, in manner and form as the said plaintiff hath above thereof complained against her.

And this she is ready to verify.

L. L. LEWIS,
U. S. Attorney, P. D.

2nd plea.

And the said defendant, by her attorney, says that the appeal to the Commissioner of Internal Revenue for the refunding of the money exacted of the plaintiff in the declaration mentioned was made to, and duly filed in the office of, the Commissioner of Internal Revenue, at Washington, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, on the 8th day of Feb'y, A. D. 1866, and that afterwards, to wit, on the 7th day of May, in the year aforesaid, after consideration thereof, the said appeal was by the Commissioner of Internal Revenue rejected; and that more than six months elapsed after the 1st day of August, in the year aforesaid, before the
26 commencement of this suit.

And this she is ready to verify.

L. L. LEWIS,
U. S. Attorney, P. D.

Thereupon the plaintiff, by counsel, filed his replication to the two foregoing pleas; which replication is in the words and figures following:

Replication.

The said plaintiff, as to said plea or pleas of the statute of limitations pleaded by said defendant, says he ought not to be barred from maintaining his action against the said defendant by reason of anything in the plea or pleas of the statute of limitations above pleaded, because he says that the appeal referred to in said plea or pleas, as made to the Commissioner of Internal Revenue on 8th Feb'y, 1866, was not duly made according to the provisions of the statute therein referred to, and the regulations of the Secretary of Treasury made in pursuance thereof; nor was the rejection of the said appeal in the said plea or pleas referred to a rejection by the Commissioner of Internal Revenue at Washington nor a rejection by said Commissioner on the merits of the said claim of the plaintiff,
27 but it was rejected for the reason that the said appeal was not duly certified in the proper forms or by the proper officers, according to the provisions of law or the regulations of Secretary of Treasury made in pursuance thereof. But the said plaintiff says that he did afterwards, on the 8th January, 1868, make an appeal under the provisions of law then existing, and in accordance with the regulations of Secretary of Treasury made in pursuance thereof; which appeal the said Internal Revenue Commissioner at Washington recognized for first time as duly made according to the law and the provisions of Secretary of Treasury made in pursuance thereof; and this appeal, so made, the plaintiff says, was then recognized by said Commissioner to be before him for consideration; which said appeal was not finally decided until on and after 22nd Jan'y, 1879; and the said plaintiff says he brought the said suit within the time prescribed by said statute of limitations; and this he is ready to verify.

And further, the said plaintiff says he ought not to be barred, &c., by reason of anything in said plea or pleas of statute of limitations above pleaded by said defendant, because he says that the said In-
28 ternal Revenue Department at Washington lost the original papers and appeal on or about the month of August, 1868, required by law to be kept in said Internal Revenue Office at Washington, and thus, by these indirect means, deprived him of the power of bringing the said action, not only as to the evidence of said appeal, but equally by these indirect means deprived him of the evidence to maintain his suit after it was brought, & this he is ready to verify, &c.

And the said plaintiff further says that he ought not to be barred in maintaining his said suit, &c., because he says that after the said time in the plea or pleas of the statute of limitations above pleaded by said def't that the Commissioner of Internal Revenue did recognize the said claim and appeal of the said plaintiff as still pending before him, inasmuch as the said Commissioner did forward questions to be asked the witnesses to the collector at Richmond, and by such questions that new, after-discovered, and most material evidence was obtained and forwarded to said Commissioner of Internal Revenue, and, after the reception of such new, material, and after-discovered evidence, the said Commissioner did reject the

claim or appeal of said plaintiff; that the said plaintiff did bring
29 his said suit within the time prescribed by said statute of limitations, and this he is ready to verify, and by reason of the said several matters contained in this his replication he prays judgment, and his damages sustained by the non-performance of the said promises and undertakings in the said declaration mentioned be adjudged to him, &c.

BURWELL & PEGRAM, *P. Q.*

And at another day, to wit, on the 15th day of December, 1881, the parties in this cause, by their attorneys, filed the following stipulation:

Stipulation.

The parties in this case, by their attorneys, hereby stipulate to waive a jury and to submit to the court for trial and determination the issues of fact in the cause.

This stipulation is filed under the provisions of section 649 of the Revised Statutes.

PEGRAM & BURWELL,
For Plaintiff.

L. L. LEWIS,
U. S. Attorney, for Def't.

30 And now at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 28th day of February, 1882:

Judgment.

SAMUEL D. HICKS
vs. } 1371. In assumpsit.
JAMES' ADMINISTRATRIX.

A jury having been waived in this cause by consent of both parties, and the case having been submitted to the court upon the pleadings and issues in the cause and also on the testimony of the witnesses examined before the court, and the facts agreed between the parties, and thereupon the matters of law and fact arising upon the pleadings and evidence in this cause being argued, it is considered by the court that the plaintiff recover against the defendant, as his damages by occasion of the defendant's intestate's non-performance of his promises and undertakings in the plaintiff's declaration set forth, the sum of $3,292.95, with legal interest thereon from the 21st day of October, 1865, 'till paid, and his costs by him in his suit in this behalf expended, to be levied of the goods and chattels of the decedent in the hands of, or which shall hereafter come to the hands of, the said defendant to be administered.

RO. W. HUGHES, *Judge.*

31 *Certificate of probable cause.*

It was clear on the trial of this case, in which the defendant was represented by the district attorney, that the defendant's intestate had probable

cause for his action in collecting the money of the plaintiff, to recover which this action was brought. Therefore, it is ordered that it be and is hereby certified unto whomsoever it may concern that in the trial of said cause it appeared that there was probable cause moving the said defendant's intestate in the said collection and acts done by him; whereupon the said judgment was had and recovered against the said defendant in this cause; and, further, the said collection and acts were done under the direction of the Commissioner of Internal Revenue.

RO. W. HUGHES, *Judge.*

Finding by the court.

The issues in fact being tried and determined by the court in this cause upon a stipulation in writing by parties through their respective counsel, filed under section 649, Revised Statutes of U. S., the court find
32 the facts as proved, under the special plea of the statute of limitations, to be that the suit was brought within six months after the final rejection of the plaintiff's appeal made to the Comm'r of Internal Revenue at Washington, the same having been pending before the Comm'r from the time the appeal was perfected on Form 46, according to provisions of law and the regulations of the Secretary of the Treasury made in pursuance thereof. It is further found that the delay in the consideration of the appeal by the Com'r after its perfection on Form 46, and the signature of the proper officers required by law, was occasioned by the loss of the original papers filed with the department by the plaintiff or his attorney, and required by law to be kept there.

The court further find the facts under the general issue to be that the plaintiff protested against the payment of the money claimed in his declaration at the time of the shipment of the tobacco to New York from Va., and, further, that the manufactured tobacco in the declaration mentioned was manufactured and removed from place of manufacture before 1st September, 1862, and it was not the subject of the 15c. tax or any internal-revenue tax, as demanded by the collector in October, 1865, but
33 was free tobacco on the day it was shipped. Whereupon the court found for the plaintiff on the issues joined and fixed his damages at $3,292.95, with interest thereon from 21st day of October, 1865, until paid.

RO. W. HUGHES, *Judge.*

And on another day, to wit, on the 18th day of March, 1882, the following order in the above-entitled cause was entered:

On motion of the defendant the judgment heretofore entered in this case is set aside, and this case is continued until the next term.

Richmond, March 18th, 1882.

RO. W. HUGHES, *Judge.*

And at another day, to wit, the 31st day of May, 1882, the following order in the above cause was entered:

On motion of the plaintiff & with the consent of the district attorney, the order entered in this case on the 18th day of March, 1882, setting aside the judgment heretofore entered in this case, is annulled, & it is ordered

by the court that the said judgment stand as the judgment of the court in this case as fully and effectually as if the same was here repeated.

Richmond, 31st May, 1882.

RO. W. HUGHES, *Judge.*

34 The following opinion of the court is filed in the papers of the cause, viz:

Opinion.

United States circuit court, eastern district of Virginia, at Richmond, January, 1882.

S. D. HICKS
vs.
WM. JAMES' ADM'R'X.

This is an action for the recovery of $3,292.95 claimed to have been illegally collected for taxes claimed to have been not really due on 218¾ boxes of manufactured tobacco which were claimed to have been removed from the place of manufacture previously to the 1st Sept., 1862, and therefore not subject to the tax imposed by the act of July 1st, 1862, "to provide internal revenue," &c.

The defendant's intestate, Wm. James, was collector of internal revenue at Richmond, Va., and the tax was paid by the plaintiff, under protest, in October, 1865, to him, as collector.

A claim, dated December 23rd, 1865, was filed in the office of the Commissioner of Internal Revenue at Washington, by the plaintiff, on the 8th Feb'y, 1866, for this identical sum of $3,292.95. That claim was made on Form 47, entitled "For the remission of taxes improperly assessed," which, under regulations of the department, was & is used only in cases where the amount of taxes assessed is alleged to have been excess-
35 ive, and the claim is only for the reduction of the assessment, but not for the refunding of taxes which have already been actually paid. It seems that plaintiff's attorney or agent in the matter confounded Form 47 with Form 46, which latter is the form required by the regulations of the department to be used where the claim is for the refunding of taxes already paid to the collector, its caption being "Claim for taxes improperly paid."

This claim for the correction of an assessment was formally rejected by the Commissioner of Internal Revenue, because, as I presume, it was made on a wrong form. It was rejected by a letter from the Commissioner to the collector dated the 10th of May, 1866.

Some time after the filing of this claim, to wit, on the 9th of March, 1866, the plaintiff filed his claim in the office of the Commissioner, made out this time on the proper form, 46, but not supported by the certificate of either the assessor or assistant assessor or collector of the district, which is required to accompany every such claim by regulations of the department. This claim was also rejected by the Commissioner, in the same letter of May 10th, 1866, already mentioned. It was rejected, I presume, because of its lack of the certificate of some proper officer of the
36 revenue in the district, as required by regulations of the department.

Afterwards, to wit, on the 8th day of January, 1868, the claim was again filed with the Commissioner by the plaintiff, this time on the proper form, 46, and this time accompanied by the certificate of a proper officer, as required by the regulations of the department.

Thus, it seems, this claim was never until January 8th, 1868, before the department in a form in which it could be considered and rejected on its merits, in accordance with what I conceive to be the meaning of section 19 of the act of July 13th, 1866. (14 Stat. at Large, 152.)

Somewhat voluminous affidavits and proofs were filed in support of this claim; but the papers belonging to it were by some accident lost by the department, and were afterwards imperfectly substituted and supplemented by other papers.

Much delay resulted from this accident, during which counsel for the plaintiff, though quite persistent, was unable to obtain a consideration (or reconsideration) of the claim by the Commissioner. Such action seems to have been prevented by an awkward discrepancy of opinion between the Commissioner and the counsel of plaintiff as to whether or not this claim had been rejected on the 10th of May, 1866.

The Commissioner insists that it was rejected then, while counsel
37 for plaintiff contends that the claim was never before the Commissioner in form to be considered on its merits until the 8th January, 1868, when it was properly presented on Form 46, and sufficiently supported by official certification.

I think myself that not until January 8th, 1868, did the plaintiff's claim come before the department in a form in which it could be decided on its merits. I think, moreover, that section 19 of the act of July 13th, 1866, contemplates that before suit can be brought for the refunding of a tax claimed to have been improperly collected it must have been rejected by the Commissioner of Internal Revenue on its merits; otherwise claimants could intentionally present their claims in irregular form for the purpose of enabling themselves, by their rejection, to bring suits in the courts in contravention of the objects of the law.

The claim which plaintiff's agent or attorney made him present in Feb'y, 1866, on Form 47, was not really the one he was entitled to make.

It was not an improper assessment of the tax which he sought to have corrected, but the improper collection of a tax which he sought to have rectified by repayment. The claim he presented on the 9th of March, 1866, on Form 46, would have been the claim which the plaintiff was entitled to prefer in the manner contemplated by section 19 of the act of July, 1866; but this claim, by not having the certificate required
38 by the regulations of the department, was not before the Commissioner in a manner in which it could be considered on its merits, or considered at all, except for the purpose of rejection for irregularity. The claim, therefore, was before the Commissioner for the first time, in a manner to be considered on its merits, on January 8th, 1868, and the only question is, whether Commissioner's letter of January 22nd, 1879, was a rejection of the claim as filed on the 8th Jan'y of the preceding year. That letter erroneously treats the claim then filed as identical with that which had been filed two years before, on the 8th February, 1866, and in insisting, though erroneously, that the rejection of the claim on Form 47 was a rejection of the subsequent claim preferred on Form 46, was in fact, and effect a rejection of the latter claim.

That being so, and the claim of Jan'y 8th, 1868, having been before the Commissioner for a longer period than six months, it is not barred, either by section 19 of the act of July, 1866, or section 44 of the act of June, 1872. (12 Stat. at Large, p. 257–8.)

Judgment must go accordingly.

39 UNITED STATES OF AMERICA, *to wit:*

To Samuel D. Hicks, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the court-room in the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein Samuel D. Hicks is defendant and Jane F. James, administratrix of William James, deceased, is plaintiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] RO. W. HUGHES, *Judge.*

40 UNITED STATES OF AMERICA,
District of Virginia, to wit:

, being duly sworn on oath, deposeth and saith that on the day of , A. D. 186 , he duly served on , in error, the within writ (or citation), by reading the same to and leaving a true copy thereof with .

Sworn and subscribed to before me this day of , A. D. 186 .

Service of the within acknowledged this day by Samuel D. Hicks, through his counsel. Nov. 17th, '82.

BURWELL & PEGRAM,
Att'ys for Hicks.

(Indorsed:) No. United States court, district of Virginia.
vs. . Citation. Filed , 186 . , clerk.

41 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Virginia, greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court before you, between Samuel D. Hicks and Jane F. James, adm'r'x of William James, deceased, a manifest error hath happened, to the great damage of the said Jane F. James, administratrix, &c., as by complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy

justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the District of Virginia.

(Indo[illegible]) No. . United States circuit court, district of Virgini[illegible] vs. . Writ of error. To . Filed , , , clerk.

42 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. F. Pleasants, clerk of the United States circuit court for the eastern district of Virginia, hereby certify that the foregoing is a true copy of the record and proceedings in the cause mentioned in the caption hereto, as the same remains in the files of my office.

Witness my hand and the seal of said court at Richmond, in said district, this 9th day of December, 1882.

[SEAL.] M. F. PLEASANTS, *Clerk.*

(Indorsement on cover:) No. 1183. Jane F. James, administratrix of William James, deceased, late coll'r of internal revenue, plaintiff in error, vs. Samuel D. Hicks. E. Virginia C. C. U. S. Filed 15th December, 1882.

6943——2

110-272

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

JAMES, ADMINISTRATRIX, &c.
vs.
HICKS.
} No. 809.

BRIEF FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

JAMES, ADMINISTRATRIX, &C., *vs.* HICKS. } No. 809.

BRIEF FOR THE PLAINTIFF IN ERROR.

Hicks brought this action on the 15th of August, 1879 (Record, p. 3), to recover $3,292.95, for taxes exacted by the intestate as collector of internal revenue, on the 31st of October, 1865.

The declaration stated in substance, among other things, that after such exaction Hicks *appealed to the Commissioner, and that this appeal remained pending until the 22d of January*, 1879. A demurrer having been overruled, James pleaded (2d plea, folio 25) that the appeal by Hicks to the Commissioner had been made upon the 8th of February, 1866, and *was rejected upon the 7th of May*, 1866, so that more than six months had elapsed after the 1st day of August, 1866, before the commencement of the suit. Thereupon Hicks replied (page 11, 2d paragraph) that the *rejection* mentioned in the plea was merely for

want of form in the appeal, and that thereupon another appeal had been taken, which was not rejected until the 22d of January, 1879, as stated in the declaration.

Trial by jury having been waived, the presiding judge duly made certain special findings, which appear briefly stated on folios 31 and 32, and are as follows:

> "The issues in fact being tried and determined by the court in this cause upon a stipulation in writing by parties through their respective counsel, filed under section 649, Revised Statutes of the United States, the court find the facts as proved under the special plea of the statute of limitations to be, that the suit was brought within six months after the final rejec- of the plaintiff's appeal made to the Commissioner of Internal Revenue, at Washington, the same having been pending before the Commissioner from the time the appeal was perfected on Form 46, according to provisions of law and the regulations of the Secretary of the Treasury made in pursuance thereof. It is further found that the delay in the consideration of the appeal by the Commissioner, after its perfection on Form 46, and the signature of the proper officers required by law, was occasioned by the loss of the original papers filed with the Department by the plaintiff or his attorney, and required by law to be kept there.
>
> "The court further finds the facts under the general issue to be that the plaintiff protested against the payment of the money claimed in his declaration at the time of the shipment of the tobacco to New York from Virginia, and, further, that the manufactured tobacco in the declaration mentioned was manufactured and removed from place of manufacture before 1st September, 1862, and it was not the subject of the fifteen-cent tax, or any internal-revenue tax, as

demanded by the collector in October, 1865, but was free tobacco on the day it was shipped. Whereupon the court found for the plaintiff on the issues joined, and fixed his damages at $3,292.95, with interest thereon from 21st day of October, 1865, until paid."

[In the court below something was supposed to turn upon a plea of the Virginia statute of limitations. But in consequence of the decision of this court in Arnson *vs.* Murphy, at the present term, so much of the pleadings, &c., as presents that contention is omitted; *ex gr.* the 1st *plea*, folio 24, and all of the replication (p. 11,) except the first paragraph.]

The acts affecting this brief are as follows:

Revised Statutes, section 2931, after providing for an appeal to the Secretary of the Treasury against decisions by collectors of customs revenue, continues:

"The decision of the Secretary on such appeal shall be final and conclusive, and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted until the decision of the Secretary of the Treasury shall have been first had on such ap-

peal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

Section 19 of the act of 1866 (July 13), ch. 184 (14 Stat., 152), is:

"That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof (and a decision of said Commissioner be had thereon), unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

Revised Statutes, Sec. 3227. (Act of June 6, 1872.)

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the

> Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

It is submitted that there is *error* in the judgment, upon this ground, viz: That it is not warranted by the special findings, these latter being omitted to notice a material fact expressly admitted in the replication (folios 26 and 27); *i. e.*, that the plaintiff had appealed *twice* to the Secretary of the Treasury from the decision of the collector; 1st, upon the 8th of February, 1866, and, on the rejection of that for informality, 2d, upon the 8th of January, 1868.

The finding omits any reference to the first appeal; it speaks only of the appeal perfected *under Form* 46, or, in other words, of January 8, 1868, although the controversy turned in great measure upon the effect of the former appeal. Inasmuch as the existence of such first appeal is a matter of record in the action it is submitted that if any legal consequences thereof be fatal to the right of recovery it is *error* to have given judgment for the plantiff.

This suit was brought in 1879, upon a claim that pended before the Commissioner of Internal Revenue upon the 6th of June, 1872 [and before], and therefore is controlled by the provision in the last sentence in the act of that date and continued in Revised Statutes, section 3227 (above).

But, upon the 6th of June, 1872, the right of action

upon the plaintiff's claim was barred under the act of 1866 (above). Because:

(1.) Inasmuch as Hicks' first appeal had been taken February 8, 1866, and also had been rejected upon the 8th of May afterwards, the latter act, *referring therein to* PREVIOUS *appeals and decisions*, required suit to be brought "within six months from the time this act *takes effect;*" *i. e.*, (10 Wall., 223), on or before August 1, 1866. *Submitting that this first appeal was the only one that the plaintiff could legitimately have taken*, and therefore that the decision thereon upon the 8th of May, 1866, barred Hicks' right of action after February 1, 1867, it appears that—whether under the 2d plea, or *because of failure to observe a condition precedent requiring suit to be brought within six months, &c.*—upon the face of the pleadings this action *remained* barred (by the act of 1872), upon and after the 6th of June, 1872.

(2.) However, supposing that the second appeal (January 8th, 1868) was in some way competent, this action *remained* barred upon the 6th of June, 1872, and afterwards because not brought "within twelve months *from the date of such appeal:*" (*i. e.*, on or before January 8, 1869), as required by the act of 1866.

In so contending I do not forget that the COURT has said in Arnson's case, at this term, that *under section* 3227 no limitation is created merely by failure to sue after "ninety days'" *delay* by the Secretary. But the provision of the act of 1866 differed herein substantially from that of section 3227, for the former expressly limited the time of bringing the suit after *delay* to a period of "twelve months from the date of such appeal," a limitation which, as is submitted, governs all suits upon such claim; *i. e.*,

suits after *decision* subsequently to such delay, as well as after the *delay* alone.

The court will observe that there is upon the record no plea of the limitation arising *under the* PROVISO to the act of 1866, but only one that alleges a failure to bring suit within six months after a decision, as provided *in the* BODY of the act. (Folio 25, 2d plead.)

Upon this point we submit that these provisions are not technically *statutes of limitation* within the rules of pleading, but are substantially statutes *imposing conditions precedent* to suit; and so that *it was incumbent* UPON THE PLAINTIFF *to allege and prove that they had been performed.*

This matter was not involved in Arnson's case; and therefore, as now presented, seems to come within the language of the COURT in Cheatham's case (92 U. S., at page 89), where the *six months' limitation*, as well as the *appeal* provided for in the act of 1866, is spoken of as "*a condition precedent to a resort to the courts;*" the general course of reasoning there being that used in the like instance of the limitation upon suits in the Court of Claims.

Upon the whole, then, these *admissions* in the pleadings (upon which therefore probably his Honor considered that he was not called upon to pass when *finding* upon the facts *in dispute*) show that judgment should have been given for the defendant below.

S. F. PHILLIPS,
Solicitor-General.

110-272

JAN 3 1884

In the Supreme Court of the U. S.

OCTOBER TERM, 1883.

JAMES' ADMINISTRATRIX, ETC.
vs.
HICKS.
No. 807.

Brief for Defendant in Error.

This is an action for recovery of taxes illegally exacted by the intestate, as collector of internal revenue.

Hicks made an ineffectual effort to the commissioner on 8th February, 1866; but as this was made on Form 47, which had reference to the abatement of an assessment of taxes instead of an appeal for refundment of an illegal exaction, the commissioner substantually ignored the same.

After the passage of the law of 1866, August 1st, which made an *appeal* to the commissioner a condition precedent to suit, Hicks made under this law an appeal for the refundment of the taxes which had been illegally exacted from him on Form 46, on the 8th January, 1868, which the commissioner for the first time recognized as made under the provisions of the above law, and according to the regulations established under it by the secretary of the treasury.

About the time of this appeal the department lost all the papers connected with this case, and consequently its decision was delayed from time to time, until the act of June 6, 1872, was passed, which provided that all such claims as were then pending before the commissioner should be saved, and an action was authorized on such, one year after a decision.

The saving clause of this act, therefore, controls this suit as regards its limitation.

This appeal continued pending until 22nd January, 1879, when it was finally rejected by the commissioner, and suit was instituted in the State courts on the 15th August, 1879, within less than twelve months after said final decision.

The brief of the Solicitor-General is, therefore, mistaken in saying that this claim was barred when the act of 1872 was passed.

In the absence of a decision, the six months' limitation of the act of 1866 does not apply, even if it had been pleaded; and surely it will not be contended, since Arnson's case at this term of the court, that there is any limitation created under this act by the plaintiff's failure to sue after the twelve months' delay in the decision by the commissioner. The claim was still "*sub judice*," and the right to sue before the final decision of the commissioner was merely "permissive, and not peremptory."

The whole purpose of the proviso to the act of 1866 is a saving in his favor, that he shall not be required to wait longer than twelve months after an appeal for an adjudication. There is nothing under this act, nor was there until that of 1872, which forbids his waiting without suit as long as he had any reason to expect a favorable decision upon his appeal.

That this is a proper construction of the two acts of 1866 and 1872, with the limitations therein contained, can, I submit, admit of but little doubt.

The record contains no plea which authorizes the plaintiff in error to avail himself of either the six months' limitation AFTER decision, or the twelve months' delay after appeal and WITHOUT the decision.

According to the entire array of Virginia authority, *where* this case was tried the defendant must plead the statute of limitations *specifically*, in order to avail himself of its *defence*.

The ruling of its court of appeals is, that even if an action should appear barred by limitation on the face of the *declaration*, that the defendant could not avail himself of THAT BY DEMURRER, but must by a plea specifically pleading the limitation. (See *Herrington* v. *Haskins*, 1 Robinson R. 591.)

This therefore being a common law action between two citizens of Virginia, instituted in her courts, the mere fact that the government of the United States intervened at a stage of this suit when it was in no way responsible for the judgment, could not alter the law of pleading and procedure of that State. For no responsibility can attach to the government of the United States until after judgment, and until a certificate of *probable cause*, by the judge trying the case, under United States law was granted.

The brief of the Solicitor-General admits that there is no proper plea of the limitation arising under the proviso of act of 1866; but seeks to avoid this defect in the record by saying that the provisions in that act, and that of 1872, are not properly *statute of limitations*, but *conditions precedent*, which the plaintiff to the action must allege and prove.

This is true of these statutes so far as they require *an appeal* to the commissioner, as the *original forum* to redress the illegal exaction; but so far as they prescribe a period of limitation *after* the *decision*, or *after appeal and without a decision*, within which suit can be commenced in the courts, they are strictly and technically statutes of limitation, and were so construed in the *Arnson* case (*supra*).

It will not, therefore, do for the Solicitor-General to say that that case does not control this, but that it is controlled by the *Cheatham* case, 92 U. S.

A careful reading of that entire case will show that the controversy there turned on the failure of Mrs. Cheatham to make a second appeal to the commissioner on the second assessment, as a *condition precedent* to that suit, instead of bringing it on payment of the amount of that assessment, and protest against it as an illegal exaction.